IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-476

TOWNS OF NORWOOD, CONCORD AND WELLESLEY, MASSACHUSETTS,
Petitioners,

v.

BOSTON EDISON COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR BOSTON EDISON COMPANY IN OPPOSITION

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COUNTERSTATEMENT OF THE QUESTION

Whether, as the Court of Appeals found, the Federal Power Commission (now the Federal Energy Regulatory Commission) erred by refusing to accept a rate for filing for failure to comply with a filing requirement that (1) had not been adopted—had not even been *proposed* to be adopted—until after the rate had been filed and (2)

shortly after having been proposed, but before adoption, was erroneously claimed to be already contained in existing regulations?

COUNTERSTATEMENT OF THE CASE

Factual background. In this case chronology is the crux of the matter. The facts are developed below in sequence:

1. In late 1972 the Commission concluded that historic test year ratemaking for the wholesale electric business was not working satisfactorily in the prevelant inflation and proposed to amend its regulations to provide for future test year ratemaking. 37 *Fed. Reg.* 28195 (1972). Under that proposal, there were to be two cost of service analyses: the analysis for Period I was to involve costs for the most recent 12 month period for which actual, experienced data were available; that for Period II was to involve estimated data for a future 12 month period beginning three months after Period I ended. Period II was to be the "test period"—that is, the rate was to be based on the Period II estimated cost of service—and Period I was to be solely a check on Period II. 50 F.P.C. 125-28 (1973).

2. Comments on the rulemaking proposal were due February 1973. 50 F.P.C. at 126. Some commenting utilities objected to the proposed three month gap between Periods I and II because they kept their books and developed forecasts on a calendar year basis and would find it difficult to develop cost of service analyses on a split test year basis (a 12 month test period spanning two calendar years). 50 F.P.C. at 128. The proposed three month gap, obviously, would eliminate the use of back-to-back calendar years for the two periods. Further, some commenting utilities asked that Period I be defined by a mechanical test—counting back a specified maximum number of months from the filing date of the rate to the end of the period. Some utilities recommended four months for such purpose; other suggested six months. 50 F.P.C. at 128. That proposal, too, would have interfered with the use of back-to-back calendar years for Periods I and II, since it would have meant that rates could be filed on such basis only in the early months of the year.

3. The Commission adopted future test year ratemaking in July 1973 in Order No. 487, 50 F.P.C. 125, *reh. denied*, 50 F.P.C. 736 (1973), *aff'd, American Public Power Ass'n* v. *FPC*, 522 F.2d 142 (D.C. Cir. 1975). It paid close attention to the definition of Periods I and II and to their time relation to one another and to the filing date of the rate change. It eliminated the three month gap between the periods that had been proposed in the notice of rulemaking and allowed Period II to commence at any time after the end of Period I but not later than the proposed effective date of the rate. That modification was made expressly in the interest of calendar year ratemaking: "This change will permit companies to file costs projected on a calendar year basis if they so desire." 50 F.P.C. at 128. As to the proposal for a mechanical test to define Period I, the Commission, again protecting calendar year ratemaking, said: "Our review of the comments which suggest changes to the proposed Period I does not alter our belief that Period I should be the most recent twelve months of actual experience." 50 F.P.C. at 128.

4. For nearly 26 months—from Order No. 487's promulgation on July 17, 1973 through September 3, 1975—the Commission applied the future test year filing requirements as promulgated in Order No. 487 without evident dissatisfaction. The previous calendar year was frequently used for Period I, and the four month and seven month mechanical tests that the Commission later

tried to read into Order No. 487 were not recognized. These are known cases in which the Commission accepted filings whose Period I was more than seven months old:

1. *Southern California Edison Co.*, 51 F.P.C. 951, *reh. denied*, 51 F.P.C. 1406, 1827 (1974), initial decision (unreported) issued September 13, 1976, Docket No. E-8570, pages 6-7; *see* certiorari petition here at 34a-45a.

   The rate was filed January 2, 1974, using calendar year 1972 for Period I. The Period I data were thus *12 months and two days old.*

2. *Louisiana Power & Light Co.*, 51 F.P.C. 1290 (1974).

   Filed February 4, 1974, the rate used the 12 months ended June 30, 1973 for Period I. The Period I data were thus *seven months and four days old.*

3. *Rockland Electric Co.*, Docket No. E-9001, September 27, 1974 order (unreported).

   Filed August 30, 1974, the rate used calendar year 1973 for Period I. The Period I data were thus *seven months and 30 days old.*

4. *Commonwealth Edison Co.*, 52 F.P.C. 1072, *reh. denied*, 52 F.P.C. 1864 (1974).

   The rate was filed August 30, 1974 using calendar year 1973 for Period I. The Period I data were thus *seven months and 30 days old.*

5. *Central Vermont Public Service Corp.*, Docket No. E-9040, December 5, 1974 order (unreported).

   The filing was made on September 27, 1974 and used calendar year 1973 for Period I. The Period I data were thus *eight months and 27 days old.*

6. *Montaup Electric Co.*, 52 F.P.C. 1865 (1974).

   Filed on October 1, 1974, the rate used calendar year 1973 for Period I. The Period I data were thus *nine months and one day old.*

It thus was well established that if a rate were filed in the late summer or fall of the year, the Period I analysis could be based on the preceding calendar year.[1]

5. Boston Edison Company ("Edison" or "the Company") commenced its preparation of its wholesale Rate S-4 filing in early 1975, as soon as the 1974 calendar year actual data were available. Relying on Order No. 487 and the Commission's then-established practice under that order, Edison selected back-to-back 1974 and 1975 calendar years for Periods I and II.

6. Edison's S-4 rate application was completed and filed on August 27, 1975. Period I was thus seven months and 27 days old when filed. Mr. Kelmon, Edison's witness sponsoring its cost of service data, stated in his prepared testimony submitted with the filing that the calendar year 1974 data were the most recent available actual data for 12 consecutive months.

7. However, in the summer of 1975, the Commission evidently had become disenchanted, for reasons never

[1] During this 26 month period the Commission refused to accept only two rate filings because of stale Period I data. In an early case, *Minnesota Power & Light Co.*, 51 F.P.C. 1422, *reh. denied*, 51 F.P.C. 2135, 52 F.P.C. 617 (1974), initial decision (unreported) issued September 1, 1976, Docket No. E-8494, the rejected data were ten months and 16 days old, which was less than some Period I data later found acceptable; however, the filing utility had volunteered in its filing letter that "if required by the Commission, the Company will prepare an updated cost of service presentation for Period I." Certiorari petition here at 25a. In the other case the Period I data were the oldest ever filed. Period I had ended 14 and a half months before the filing was completed; the Commission said that the 1973 test period was too stale and outdated to support rates for the future. *Public Service Company of New Hampshire*, Docket No. E-9290, April 11, 1975 order at 3, *reh. denied*, June 4, 1975 order. 5 Fed. Power Serv. 5-818.

fully articulated, with the flexible definition of Period I adopted in Order No. 487. On September 3, 1975, one week after Edison's Rate S-4 filing, the Commission initiated, with an innocuous-appearing notice of proposed rulemaking, what proved to be a dizzying series of filing requirement developments. 40 *Fed. Reg.* 42029 (1975). The notice of rulemaking stated that the Commission proposed to limit Period I to a 12 month period ending within four months of the filing date of the rate—one of the mechanical tests that it had explicitly rejected in Order No. 487. The notice forthrightly characterized the rulemaking proposal as an "additional requirement" not contained in the existing regulations, which, the notice said, did "not specify how current the actual data must be," were "ambiguous," had given rise to "varying constructions," required "subjective judgment" and were "open to interpretation." 40 *Fed. Reg.* at 42029. The notice made clear that the proposed rulemaking was primarily directed at back-to-back calendar year ratemaking, which, it said, resulted "in less recent data than if the company had utilized a split test year cost of service." 40 *Fed. Reg.* at 42029. The public were invited to comment on the rulemaking proposal by November 19, 1975. 40 *Fed. Reg.* at 42029-30.

8. On September 10, 1975, one week after the notice of proposed rulemaking was issued, the same day on which that notice was published in the Federal Register, and well over a month before comments were due, the Commission commenced *applying* the proposed four month test to tendered rate increase applications. In *Interstate Power Co.*, Docket No. ER76-70, September 10, 1975 (unreported, *see* certiorari petition here at 46a), the Commission refused to accept calendar year 1974 as Period I. It commented that the data were "over seven months old when filed" and were therefore "stale" (at 46a-47a). Refusals to accept other utilities' rate filings quickly followed under the *Interstate* precedent. The

utilities were instructed to refile under the proposed four month test. Despite the Commission's later claims to have uniformly applied a seven month test, it became clear beyond doubt that it was actually applying a four month test when, in *Arkansas Power & Light Co.*, Docket No. ER76-110, October 7, 1975 letter order (unreported, *see* Appendix A attached), it refused to accept a rate in which Period I had ended only five months and 18 days before the filing date.

9. On September 24, 1975 the Commission sent Edison a letter order stating that the Rate S-4 filing was "deficient" because the Period I data were "out of date." *See* certiorari petition here at 12a. The letter instructed Edison to "submit actual data for the period ending no earlier than four months prior to the date of filing of the proposed increase" (at 13a). The Commission simply noted that its action was "consistent with" the *Interstate* order of two weeks before and the notice of proposed rulemaking of three weeks before.[3] On October 15, 1975 Edison applied for rehearing of the Commission's refusal to accept Rate S-4 for filing on the major ground that *Interstate* imposed a new filing requirement before it was properly adopted in the rulemaking proceeding.

10. On October 29, 1975, while Edison's application for rehearing was still pending, the Commission introduced a new twist to its Period I policy in *Consumers Power Co.*, Docket No. ER76-45 (unreported order, *see* Appendix B), one of the cases refusing acceptance for filing under *Interstate*. The Commission in *Consumers Power* abandoned the four month test and substituted a seven month test. It sought to create the impression, however, that it had always been applying the seven

[3] Certiorari petition here at 13a. The Commission also cited its September 19, 1975 unpublished letter order to Ohio Power Company—its first application of *Interstate* as precedent. *Id.*

month test in *Interstate* and the cases that followed in its wake (at B-3):

> In the *Interstate* order, we were dealing with data that was 7½ months old and made the determination that such data was too stale to be "the most recently available" and therefore rejected Interstate's filing for failure to comply with Section 35.13(b)(4)(iii) of the Regulations. Since that action, we have consistently refused to accept rate filings containing Period I data which was more than seven months old.

The Commission cited no regulation or practice as the source of the seven month test. Nor did it explain how the test could be squared with its previous practice, under the same regulation, of accepting for filing rates in which Period I was more than seven months old.

11. Immediately after issuing *Consumers Power* the Commission moved to modify the actions that it had taken previously under the four month test. On October 31, 1975—two days after the *Consumers Power* order—it vacated its October 7, 1975 letter order in *Arkansas Power & Light Co.*, (Appendix A), in which it had rejected a filing in which Period I was five months and 18 days old, and accepted that rate for filing. *Arkansas Power & Light Co.*, Docket No. ER76-110, October 31, 1975 (unreported order, *see* Appendix C). The Commission proceeded to write to utilities that previously had been advised to resubmit their rejected filings in compliance with the four month test that they should comply, instead, with a seven month test. Edison received such a letter dated November 11, 1975. *See* certiorari petition here at 14a.

12. On November 14, 1975, the Commission denied Edison's application for rehearing. *See* certiorari petition here at 16a. Supporting the denial, the Commission merely observed, "Since . . . [*Interstate*], we have consistently refused to accept rate filings containing

Period I data which were more than seven months old" (at 19a).

13. Edison on November 19, 1975 appealed the Commission's deficiency letter order of September 24, 1975 and the order denying rehearing of November 14, 1975 to the D.C. Circuit in No. 75-2123.

14. The next development in the winding course of regulation was the Commission's issuance in the rulemaking proceeding, commenced almost five months before, of Order No. 545, Docket No. RM76-6, on January 20, 1976. 41 *Fed. Reg.* 3848 (1976). The Commission there rejected the four month test that had been proposed in the rulemaking notice and adopted, instead, the seven month test. The order, curiously, made the new seven month standard *prospectively* effective from the date of its publication. The order noted that the "present regulations are unspecific as to this time interval" and that, therefore, it was acting "to eliminate the current ambiguity." 41 *Fed. Reg.* at 3848-49.

15. Three days later, on January 23, 1976, Edison submitted to the Commission cost of service analyses for Periods I and II that complied with the requirements of the orders under appeal here. The Company requested the Commission to allow the filing to become effective thirty days after the submission of those analyses and, if the Commission chose to suspend the rate increase, to limit the suspension period to no more than four days, so that Rate S-4 could become effective on February 27, 1976, the date on which the rate increase would have become effective if the original filing had been accepted and suspended for the maximum five month period permitted by statute. The Company stated that if the Commission assigned that date as the effective date, its appeal would be mooted.

16. The Commission on February 20, 1976 accepted Rate S-4 for filing, treated January 23, 1976—the date

the updated Periods I and II data had been submitted—as the filing date and suspended the filing for the maximum statutory five months, until July 24, 1976. Edison's application for rehearing seeking a February 27, 1976 effective date was denied on April 12, 1976.

17. On April 26, 1976, Edison appealed the suspension order of February 20, 1976 and the order denying rehearing of April 12, 1976 to the D.C. Circuit in No. 76-1392. That appeal and the earlier appeal in No. 75-2123 presented identical issues and were consolidated for decision.

The decision below. The D.C. Circuit in *Boston Edison Co.* v. *FPC*, 557 F.2d 845, 848 (1977) stated the issue thus: "whether the Commission was acting within its authority in rejecting a rate filing already pending on 3 September 1975 [the date that the four month test had been proposed in rulemaking], which had been filed pursuant to then effective regulations." The court proceeded to hold that the Commission had abused its authority, and it remanded the case to the Commission with instructions to permit Edison's "S-4 rate filing [to] become effective as of 27 February 1976, five months from the filing date of 27 August 1975." 557 F.2d at 849.

Reciting the history of the Order No. 487 regulations and their application, the court said that "it is readily apparent that . . . calendar year cost-of-service data for Period I had been customarily received by the FPC in relation to rate increase filings." 557 F.2d at 848. It noted that "the earliest notice of any change in the standard was subsequent to petitioner's filing. . . ." 557 F.2d at 849. The heart of its rationale was this (557 F.2d at 849):

> Although an administrative agency is not bound to rigid adherence to its precedents, it is equally essential that when it decides to reverse its course, it must give notice that the standard is being changed, *Columbia Broadcasting System, Inc.* v. *Federal Communications Commission* [454 F.2d 1018, 1026 (D.C. Cir. 1971)], and apply the changed standard only to those actions taken by parties after the new standard has been proclaimed as in effect.

The court relied upon *Golden Holiday Tours* v. *CAB*, 531 F.2d 624 (D.C. Cir. 1976), for the proposition that a switch to a mechanical application of a filing standard after a continued pattern of relatively flexible application could be an arbitrary and abusive administrative act.

COUNTERARGUMENT

The petitioning Towns of Norwood, Concord and Wellesley, Massachusetts ("the Towns") offer two reasons that this Court should grant their petition for a writ of certiorari. First, they argue that the D.C. Circuit's decision runs counter to the judicial deference that is to be paid to administrative interpretations under *Udall* v. *Tallman*, 380 U.S. 1 (1965). Second, they claim that, even if the D.C. Circuit's decision on the merits was correct, its remedy—allowing Edison's S-4 rate to go into effect when it would have gone into effect except for the Commission's error of law—somehow permits "exploitation at the hands of utilities" (at 4).

I.

The Towns' reliance on *Udall* is misplaced. This Court there held that an administrative interpretation is entitled to judicial deference *in certain specified circumstances*. Those circumstances do not exist in the present case:

1. One condition of deference under *Udall* is that the wording of the regulation under judicial examination

create doubt about intent and that the administrative interpretation resolving that doubt *not* be "plainly erroneous" or "inconsistent with the regulation." 380 U.S. at 16-17. No such condition exists here. The Commission began asserting in September 1975 that its July 1973 Order No. 487 regulations contained a mechanical four month or seven month staleness test for Period I. The words of the regulations, however, made no reference to any such mechanical test; rather, they set out the more flexible test of "the most recent twelve consecutive months for which actual data are available." 50 F.P.C. at 130. Further, the order promulgating the regulations had made explicit that four month and six month mechanical tests had been considered and rejected in the rulemaking process in favor of the more "flexible" standard. 50 F.P.C. at 128. Thus, the Commission's interpretation asserted in September 1975 cannot be accepted as one of several possible readings of an unclear regulation; it was, instead, a reading contrary to the intent appearing both on the regulation's face and explained in its promulgating order. In that light the Commission's interpretation was about as "plainly erroneous" and "inconsistent with the regulation" as can be imagined.

2. A second condition of deference under *Udall* is that the administrative interpretation has been consistently applied. 380 U.S. at 17-18. But here the Commission's sudden claim in September 1975 to a four month or a seven month mechanical test was directly at odds with its interpretation of the Order No. 487 regulations for the preceding 26 months. During that period the Commission had accepted numerous filings in which Period I was more than four months old and at least half a dozen in which it was more than seven months old (see pages 4-5 above). The Commission prior to September 1975 never rejected for staleness *any* filing whose Period I was the age of Edison's Period I—between seven and eight months old (see note 1 at page 5 above). Thus, the Commission's September 1975 claim that the Order No. 487 regulations embodied a four month or seven month test was an abrupt reversal of its prior course of interpretation.[3]

3. *Udall* establishes that an administrative interpretation made contemporaneously with the promulgation of the regulation is entitled to greater deference than one made thereafter. 380 U.S. at 16. Here the Commission's first assertion that the Order No. 487 regulations contained a four month or seven month test was made some 26 months after their promulgation. The contemporaneous interpretation, by contrast, was that the Order No. 487 regulations embodied a "flexible" definition in preference to a mechanical test. 50 F.P.C. at 128. Two early applications of the regulations demonstrate that the Commission from the outset was operating under a flexible standard. Both cases involved a calendar year 1972 for Period I. In one case, *Minnesota Power & Light Co., supra*, 51 F.P.C. at 1422, the filing had been made on November 16, 1973, so that Period I (1972 data) was ten and a half months old; the filing utility, by offering in its submittal letter to file an updated Period I if the Commission so required, effectively admitted that the filed Period I was not the most recent

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[3] The Towns suggest (at 21-23) that the Commission may have applied a mechanical test all along, but simply waived the test in accepting certain filings; the acceptance orders, however, contain no language of waiver. In any event, routine, unexplained waiver would be the functional equivalent of a course of interpretation.

Further, the Towns assert that the Commission merely failed to enforce the seven month mechanical test in 1974 and that the Commission's temporary lapse cannot estop it from later enforcement. But, as shown in the factual background above, the flexible, case-by-case approach was not a temporary "lapse" occurring in 1974 for filings using 1973 for Period I; it was an articulated, consistently-applied approach from the promulgation of the regulations until the *Interstate* order in September 1975—that is, for nearly 26 months.

available. The Commission rejected the filing. 51 F.P.C. at 1422. In the second case, *Southern California Edison Co., supra*, 51 F.P.C. at 951, the filing was made on January 2, 1974, more than a year after the end of Period I. The filing utility, in response to the Commission's inquiry, explained that the 1972 data were the most recent available because certain of its data were kept only on a calendar year basis. *See* certiorari petition here at 44a. The Commission accepted the filing. If it had been operating under a mechanical four month or seven month test, it would have rejected the filing. Thus the Towns are inaccurate in asserting (no fewer than eight times in the course of their petition) that the "contemporaneous" construction found a mechanical seven month test in the Order No. 487 regulations.[4]

4. Under *Udall* an administrative interpretation commands judicial deference only if it is a matter of public record. 380 U.S. at 17-18. However, if, as the Towns contend, the Commission's "contemporaneous" interpretation of the Order No. 487 regulations was that they embodied a seven month mechanical test, that interpretation was certainly one of Washington's best kept secrets between 1973 and 1975. The words of the Order No. 487 regulations themselves did not suggest any mechanical test; the terms of the promulgating order explicitly rejected such a test; no later order articulated one; and no subsequent Commission action implied one. Indeed, subsequent Commission acceptance of older Period I data in various filings was inconsistent with any such test. Under *Udall* there is no deference due a professed administrative interpretation that has been kept as a private artifact of the agency.

[4] The Towns also are inaccurate in asserting (at 21) that the Commission "reiterated its seven-month criteria in 1975 in *Public Service Company of New Hampshire*." The Commission's orders in that case made no reference to a seven month test; the rejected Period I data were 14 and a half months old. 5 Fed. Power Serv. 5-818.

A Supreme Court case closer to the point than *Udall* is *Atchison, Topeka & Santa Fe Railway Co.* v. *Wichita Board of Trade*, 412 U.S. 800 (1973). There this Court held that an administrative agency has a "duty to explain its departure from prior norms." 412 U.S. at 808; *accord*, *Secretary of Agriculture* v. *United States*, 347 U.S. 645, 653 (1954). In effect, the *Atchison* case carves out an exception to the *Udall* rule of deference: when an agency reverses its sustained course of interpretation without explanation, it loses the claim to deference that it might otherwise assert. *See* K. C. Davis, *Administrative Law of the Seventies*, § 17.07-4 at 413-17 (1976).[5]

[5] *Atchison's* teaching that agencies must explain departures from prior norms has been one of the most potent, frequently-used doctrines of administrative law in recent years: *Chem-Haulers, Inc.*, v. *ICC*, No. 76-1488, slip op. at 11 (D.C. Cir. September 19, 1977) (Where the agency's decision "represents a change of policy, the Commission must vouchsafe its whys and wherefores . . ."); *Waterways Freight Bureau* v. *ICC*, No. 76-1598, slip op. at 12-13 n.11, 17 (D.C. Cir. July 1, 1977) ("Some explanation is due both the parties and the reviewing court when a decision is made that *conflicts* with relevant precedent."); *Pennsylvania* v. *ICC*, No. 76-1558, slip op. at 25-26 (D.C. Cir. June 20, 1977) ("When a reviewing court examines a change in agency policy, the key factor that guides the scrutiny is whether the policy change has been adequately explained and justified so that the parties upon whom the policy will have an impact understand the newly adopted agency position."); *The Second National Natural Gas Rate Cases*, Docket Nos. 76-2000, *et al.*, slip op. at 23 (D.C. Cir. June 16, 1977) (An agency's "change in policy must be avowed and reasoned"); *Continental Air Lines, Inc.* v. *CAB*, 551 F.2d 1293, 1303 (D.C. Cir. 1977) ("Reasoned decisionmaking requires an agency to explain changes of policy from past decisions and apparent inconsistencies within the same decision."); *International Union, UAW* v. *NLRB*, 459 F.2d 1329, 1341 (D.C. Cir. 1972) ("It is an elementary tenet of administrative law that an agency must either conform to its own precedents or explain its departure from them"); *Greater Boston Television Corp.* v. *FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971) (An "agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored . . .").

II.

The Towns' alternative ground for granting their petition for a writ of certiorari is that the D.C. Circuit's remedy is unfair and unlawful. That court remanded with instructions to allow Rate S-4 to become effective (subject to refund by Edison after hearing on the merits of the proposed increase) when it would have become effective, assuming the maximum five month suspension, if the Commission had not committed legal error in interpreting its filing regulations. 557 F.2d at 849. The Towns maintain (at 26) that, as "protected" entities, they cannot be required to "insure" against Commission error. They say that the risks of that error should be borne by the Company. But the court's remedy works no injustice and imposes no "insurance" obligation. The parties are merely returned to the positions that they would have occupied if the Commission had not erred in applying its filing regulations.

The propriety of such restitution is well recognized. As Mr. Justice Cardozo observed in *Atlantic Coast Line Railroad Co.* v. *Florida*, 295 U.S. 301, 309 (1935), the Supreme Court's decisions "have given recognition to the rule as one of general application that what has been lost to a litigant under the compulsion of a judgment shall be restored thereafter, in the event of a reversal, by the litigants opposed to him, the beneficiaries of the error." [*] The Court held that restitution was not required there only because it would offend equity in the particular "unique" circumstances of that case: a ratemaking order remedying a railroad rate discrimination had been vacated for lack of evidentiary findings, but the necessary findings had subsequently been supplied

[*] The D.C. Circuit "drew support" from that *Atlantic Coast* rule as recently as 1973, *Democratic Central Committee of the District of Columbia* v. *Washington Metropolitan Area Transit Comm'n*, 485 F.2d 786, 824 (1973), *cert. denied*, 415 U.S. 935 (1974).

and the error of the order, in effect, repaired. 295 U.S. at 314-16. Nowhere in the record was there any evidence that the rate discrimination found "illegitimate at one time" had been "innocent at another." 295 U.S. at 316. Therefore equity did not lie to grant the restitution.

In the absence of any such excusing circumstance, the courts have retroactively restored parties to their proper positions as relief from errors of law in ratemaking proceedings under both the Natural Gas Act and the Federal Power Act. In *Tennessee Valley Municipal Gas Ass'n* v. *FPC*, 470 F.2d 446, 452-53 (D.C. Cir. 1972), the customers had brought a complaint seeking reduction of an existing rate, a form of relief that under Section 5(a) of the Natural Gas Act can be granted only prospectively from the Commission's order on the merits. 15 U.S.C. § 717d(a) (1970). The Commission, after hearings, dismissed the complaint on the specious ground that the test period had become stale; then 112 days later, perhaps recognizing that the dismissal was indefensible, it reopened the proceeding. The D.C. Circuit found that the Commission's dismissal of the complaint had been legal error and, as a remedy, ordered the Commission to place any reduced rate into effect 112 days before the date of the order fixing the reduced rate. The court held that the "grant of retroactive relief for this period does not conflict with the anti-reparations language in the statute." 470 F.2d at 452.

In another case, *Indiana & Michigan Electric Co.* v. *FPC*, 502 F.2d 336, 343-48 (D.C. Cir. 1974), *cert. denied*, 420 U.S. 946 (1975), the court held that since the Federal Power Act explicitly provided for 30 days notice of a rate increase, the Commission by regulation could not extend the notice to 60 days; the court ordered the Commission to permit the rate filing involved in that case to become effective 30 days earlier than the

Commission had allowed.[7] Indeed, the D.C. Circuit applied its remedy here on the authority of *Indiana & Michigan*. 557 F.2d at 849. The relief granted in the present case—that the Company may collect monies that it might have collected except for the Commission's error of law—is thus well-founded in precedent.[8]

The Supreme Court in *United States* v. *New York Central Railroad Co.*, 279 U.S. 73 (1929), held that constitutional principle is not offended by making a rate, at the time of its determination, retroactively effective no earlier than the date of its filing. Mr. Justice Holmes said in that case (279 U.S. at 78-79):

> [T]he filing of an application expresses a present dissatisfaction and a demand for more. . . . If the claim of the railroads is just they should be paid from the moment when the application is filed.

The *New York Central* principle remains efficacious. *Transcontinental & Western Air, Inc.* v. *CAB*, 336 U.S. 601, 604-05 (1949); *United States* v. *CAB*, 510 F.2d 769, 774-75 (D.C.Cir. 1975). The D.C. Circuit decision that is

[7] The Commission had granted the statutory maximum five month suspension, but under the Court's decision on the merits that action had not been timely taken and the rate increase, by operation of law, had become effective without suspension. The Court, relying on equitable considerations, on rehearing disallowed restitution for the five month suspension period and permitted recoupment of one month's, rather than six months', increased revenues. In the present case, the court's relief is likewise predicated on a five month suspension of Edison's Rate S-4.

[8] The Towns cite two D.C. Circuit opinions holding that the risk of loss from a stay pending appeal in a proceeding to increase bus fares must be borne by the bus company (at 24-25 n.32). But the Towns overlook the D.C. Circuit's distinction between bus fare and utility rate cases on the subject of retroactive adjustment: "That no mechanism was provided [in the interstate compact for regulating bus fares] for retroactive adjustment of rates [*i.e.*, refunds] may well reflect the different problem presented by bus riders on the one hand, and gas or electric customers on the other." *Williams* v. *Washington Metropolitan Area Transit Comm'n*, 415 F.2d 922, 941 n.94 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1081 (1969).

sought to be reviewed here is entirely consistent with that principle: Edison has not sought to implement its rate increase for any period before its filing; in fact, under the D.C. Circuit's decision, 557 F.2d at 849, the rate increase would not be implemented until five months—the maximum statutory suspension period—*after* the date of its filing.

CONCLUSION

This case involves no departure from the law of *Udall* v. *Tallman* and presents no new or unsettled principle of restitution upon reversal of a legally erroneous decision of a lower forum. For those reasons, the Towns' petition for a writ of certiorari should be denied.

Respectfully submitted,

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October 26, 1977

APPENDICES

APPENDIX A

***Arkansas Power & Light Co.*, Docket No. ER76-110, October 7, 1975 letter order (unreported)**

Central Files (Public)

FEDERAL POWER COMMISSION
Washington, D.C. 20426

In Reply Refer to:
PWR-RC
Docket No. ER76-110
October 7, 1975

CERTIFIED MAIL

Arkansas Power & Light Company
Attention: Mr. O. V. Holeman
Director of Rates and Research
9th & Louisiana Streets
Little Rock, Arkansas 72203

Gentlemen:

By letters dated September 8, and September 18, 1975, you submitted for filing proposed rate schedules providing for increased rates applicable to your wholesale for resale customers. By letter dated September 24, 1975, you were informed that your filing was deficient with respect to certain requirements of Part 35 of the Commission's Regulations under the Federal Power Act. This is to inform you that your filing is also deficient as follows:

You provided Period I test data for the period ending March 31, 1975. Under Section 35.13(b)(4)(iii) of the Commission's Regulations, Period I data is required for the most recent twelve consecutive months for which actual data are available. Our review of your filing indi-

cates that because the Period I test data which you provided is out of date, we cannot properly evaluate the propriety of your proposed rate increase. Therefore, please submit actual data for the period ending no earlier than four months prior to the date of filing of the proposed increase. We note that this action is consistent with our Order Rejecting Proposed Rate Increase and Denying Waiver in *Interstate Power Company*, Docket No. ER76-70, issued September 10, 1975, our letter order in *Ohio Power Company*, Docket No. ER76-83, issued September 19, 1975, and our Notice of Proposed Rulemaking, Docket No. RM76-6, issued September 3, 1975.

We additionally note that your proposed rates are based on data for Period II, ending March 31, 1976. Therefore, pursuant to Section 35.13(b) (4) (iii) of the Commission's Regulations, which requires that Period II begin after the conclusion of Period I, revised Period II data should also be submitted.

A filing date will not be assigned to your submittal pending recepit of the additional requested information.

Very truly yours,

Secretary

APPENDIX B

Consumers Power Co., Docket No. ER76-45, October 29, 1975 order (unreported)

DC-24

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: Richard L. Dunham, Chairman; William L. Springer, Don S. Smith, and John H. Holloman III.

Docket No. ER76-45

CONSUMERS POWER COMPANY

ORDER DENYING APPLICATION FOR REHEARING

(Issued October 29, 1975)

On July 30, 1975, Consumers Power Company (CPC or Company) tendered for filing revised tariff sheets that would increase wholesale rates to certain partial and fuel requirement customers [1] by $5,065,720 based on sales for the twelve month period ending December 31, 1975. In response to public notice issued August 7, 1975, of CPC's filing, Twelve Publicly Owned Wholesale Customers (Systems) timely filed a petition to intervene, together with a motion to reject or, in the alternative, motion for summary judgment of that portion of the proposed rate increase attributable to comprehensive tax normalization and five month suspension of the remainder of the proposed increase. By order issued August 29, 1975 we, *inter alia*, suspended CPC's proposed rate increase for 30

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[1] See order issued August 29, 1975, in the subject docket for list of customers affected by the proposed rate increase.

days, denied Systems' motion to reject and provided for response to Systems' motion for summary disposition on the tax normalization issue.

On September 29, 1975, Systems filed an application for rehearing in part of our August 29, 1975, order. Systems contends that (1) a suspension period of five months, or at least longer than the 30 days imposed by our order, is justified in light of the "price squeeze" effect of the increase and alleged anticompetitive conduct of the Company, (2) the filing should have been rejected based on non-compliance with Commission regulations in CPC's alleged failure to file the most recent 12 months cost data and alleged failure to provide adequate work papers to support its cost of service and (3) that the "end result" of our order that "the Cities must pay the rates the Company asks" is unjustified.

Systems' first contention that a longer suspension period should have been granted renews two arguments presented in its earlier Motion to Reject in this docket. First, Systems states that "CPC has demonstrated a long-standing pattern of anticompetitive conduct" and this filing only furthers that pattern of behavior. Secondly, Systems argues that the Commission could avoid a wholesale-retail price squeeze by granting a five-month suspension period which would put Commission action on this wholesale rate increase more closely in line with the deadline for action on CPC's retail price increase now pending before the Michigan Public Service Commission. Our decision to suspend for 30 days was based on our review of CPC's filing and the testimony and exhibits in support thereof. Based on such review we exercised our independent judgment in light of our expertise in this area and concluded that a 30 day suspension was sufficient to protect the public interest and the parties to this proceeding. Upon further review, we reaffirm our prior order and conclude that the 30 day suspension was proper. The period of

suspension is a matter of discretion and not subject to judicial review. *Municipal Light Boards* v. *F.P.C.*, 450 F.2d 1341, 1352 (1971).

Systems second contention is that CPC has failed to file its most recent 12 months cost data and hence its filing must be rejected for non-compliance with Commission's Regulations under the Federal Power Act.[2] In support of this, Systems cites *Interstate Power Company*, Docket No. ER76-70, in which by order issued September 10, 1975, its filing was rejected on the basis of data over seven months old, and *Boston Edison Company*, Docket No. ER76-90, in which by letter order issued September 24, 1975, its rate increase filing was rejected based on similar data.

During the year 1975, we have accepted electric rate filing utilizing Period I data for the twelve months ended December 31, 1974, as meeting the filing requirement of Section 35.13(b)(4)(iii) of the Regulations that such data be ". . . for the most recent twelve consecutive months for which actual data are available. . ." However, we realized in so doing that at some point in time data for the twelve months ended December 31, 1974, would eventually become stale and thus outside any reasonable interpretation of Section 35.13(b)(4)(iii) of the Regulations which requires submission of the most recently available data. In the *Interstate* order, we were dealing with data that was 7½ months old and made the determination that such data was too stale to be "the most recently available" and therefore rejected Interstate's filing for failure to comply with Section 35.13(b)(4)(iii) of the Regulations. Since that action, we have consistently refused to accept rate filings containing Period I data which was more than seven months old. Accordingly, since Consumers has not reflected data

[2] Regulations Under Federal Power Act, Section 35.13(b)(4)(iii).

for Period I which is more than seven months from the date of its tender for filing, we shall deny Systems' motion to reject. We find that the Period I data contained in Consumers' filing is sufficient to meet the requirements of Section 35.13(b)(4)(iii) of our Regulations.

Finally, Systems contends that the "end result" of our order is "unjustified and unjustifiable" in that "the end result is that the Cities must pay the rates the Company asks." We believe that the public interest is protected in this respect by that provision of our order which places the rate increase into effect subject to refund pending the outcome of the hearing thereon. The issues raised by intervenors, such as rate-of-return and substantiation of cost-of-service studies, among other, can be best pursued at open hearing where a complete evidentiary record can be established to determine the lawfulness of the proposed rate increase. At that time, should any of the proposed increase be found not to be just and reasonable, CPC will be required to refund that portion of the rate increase collected pursuant to the conditions of our August 29, 1975 order with interest at 9% per annum.

For the reasons discussed above, we are of the opinion that Systems' application for rehearing of those parts of our August 29, 1975 order dealing with length of suspension period, acceptance of CPC's filing as submitted, and Systems' "end result" contentions contained therein should be denied.

The Commission finds:

Systems' application for rehearing filed September 29, 1975, in the subject docket presnets no new facts or principals of law which warrant modification of our order of August 29, 1975, in the subject docket.

The Commission orders:

(A) Systems' September 29, 1975, application for rehearing of our order of August 29, 1975 is hereby denied.

(B) The Secretary shall cause prompt publication of this order to be made in the Federal Register.

By the Commission.

[SEAL]

KENNETH F. PLUMB,
Secretary.

APPENDIX C

***Arkansas Power & Light Co.*, Docket No. ER76-110, October 31, 1975 order (unreported)**

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: Richard L. Dunham, Chairman; Don S. Smith, and John H. Holloman III.

Docket No. ER76-110

ARKANSAS POWER & LIGHT COMPANY

ORDER ACCEPTING FOR FILING AND SUSPENDING PROPOSED RATES

(Issued October 31, 1975)

On September 8, 1975, Arkansas Power & Light Company (AP&L) tendered for filing a proposed rate increase. Upon further review of the record in this proceedings, we find that the tendered filing, as supplemented by the data filed by AP&L on October 1, 1975, substantially complies with our filing requirements in Part 35 of the Regulations. However, the proposed rates and charges have not been shown to be just and reasonable. Accordingly, we shall accept for filing AP&L's tendered filing and suspend it until December 1, 1975, when it shall become effective, subject to refund. We shall establish hearing procedures by further order.

The Commission orders:

AP&L's September 8, 1975 filing, as completed on October 1, 1975, is hereby accepted for filing and suspended until December 1, 1975, when it shall become effective subject to refund.

By the Commission.

[SEAL]

KENNETH F. PLUMB,
Secretary.